

Cornell Motion for Summary Judgment Exhibit 29

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 Civil Action No. 1:16-CV-6525-PKC
- - - - -x

4 CASEY CUNNINGHAM, et al.,
5
6 Plaintiffs,

7 -against-

8 CORNELL UNIVERSITY, et al.,
9
10 Defendants.

- - - - -x

11 August 10, 2018
12 11:43 a.m.

13 Videotaped Deposition of TIAA, by
14 ADAM POLACEK, taken by attorneys for Plaintiffs,
15 pursuant to subpoena, held at the offices of
16 Wilmer Hale LLP, 7 World Trade Center, 250
17 Greenwich Street, New York, New York, before
18 Helen Mitchell, a Registered Professional
19 Reporter and Notary Public.
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22
23
24

<p style="text-align: right;">Page 98</p> <p>1 MR. KONSTANDT: Objection to</p> <p>2 the form.</p> <p>3 A As of right now, and</p> <p>4 historically there has not been anything that</p> <p>5 would preclude the individual from doing so.</p> <p>6 However, that doesn't necessarily imply that</p> <p>7 that option would always be available to that</p> <p>8 individual.</p> <p>9 Q Why might it not be available?</p> <p>10 A That is a decision point that</p> <p>11 is one that TIAA can enforce. Heretofore we</p> <p>12 have not precluded such a transfer from a mutual</p> <p>13 fund to an annuity. However, it would be within</p> <p>14 the right of the company to do so at some point</p> <p>15 in the future.</p> <p>16 Q Okay. So with respect to the</p> <p>17 Cornell plans, has TIAA ever imposed any</p> <p>18 restriction on the ability of a plan participant</p> <p>19 to transfer funds from a mutual fund to a</p> <p>20 variable annuity and then immediately annuitize?</p> <p>21 MR. KONSTANDT: Objection to</p> <p>22 the form.</p> <p>23 A I can't speak to anything</p> <p>24 specific to Cornell in -- with respect to your</p>	<p style="text-align: right;">Page 100</p> <p>1 that to be the case today.</p> <p>2 Q TIAA has the ability to provide</p> <p>3 record keeping services for investments of other</p> <p>4 companies; is that right?</p> <p>5 A In general we do record-keep</p> <p>6 certain investments from -- vehicles, I should</p> <p>7 say -- from other investment managers on plan.</p> <p>8 Q Are there any investment</p> <p>9 products for which TIAA cannot provide record</p> <p>10 keeping services?</p> <p>11 A I can't speak to that</p> <p>12 specifically.</p> <p>13 Q Okay.</p> <p>14 And you're here to speak as</p> <p>15 TIAA's representative on topics including the</p> <p>16 ability of other vendors to provide record</p> <p>17 keeping and/or administrative services for TIAA</p> <p>18 investment options; correct?</p> <p>19 A If it was enumerated, then,</p> <p>20 correct, I've agreed to that.</p> <p>21 Q And you're also here to speak</p> <p>22 as TIAA's representative on TIAA's ability to</p> <p>23 provide record keeping services for investment</p> <p>24 options offered by other investment managers; is</p>
<p style="text-align: right;">Page 99</p> <p>1 question.</p> <p>2 Q And why can't you speak to</p> <p>3 anything specific to Cornell?</p> <p>4 MR. KONSTANDT: Objection to</p> <p>5 the form.</p> <p>6 A I'm not -- I am -- the question</p> <p>7 that you had stated requires that I know an</p> <p>8 intimate -- I can't -- I can't answer the</p> <p>9 question with respect to Cornell.</p> <p>10 Q Okay.</p> <p>11 But historically there's no</p> <p>12 restriction, as far as you are aware, of any</p> <p>13 kind, of Cornell or anyone else, on the ability</p> <p>14 of plan participants to transfer funds from</p> <p>15 mutual funds to variable annuities and then</p> <p>16 annuitize immediately thereafter; is that fair?</p> <p>17 A As far as I am aware, in</p> <p>18 general the company heretofore has -- we have</p> <p>19 not put such restriction in place; however,</p> <p>20 could potentially retain -- do retain the right</p> <p>21 to make such restrictions in the future.</p> <p>22 Q TIAA serves as a record keeper</p> <p>23 to the Cornell plans; is that right?</p> <p>24 A As I understand it, I believe</p>	<p style="text-align: right;">Page 101</p> <p>1 that right?</p> <p>2 A I am -- I am acting in that</p> <p>3 capacity right now.</p> <p>4 Q Okay. So in that capacity, are</p> <p>5 there any investment products for which TIAA</p> <p>6 cannot provide record keeping services?</p> <p>7 MR. KONSTANDT: Object to form.</p> <p>8 A It's a very vague question that</p> <p>9 I could -- am not in a position to answer in</p> <p>10 terms of any specifics.</p> <p>11 What I can say is that TIAA</p> <p>12 does currently, across a variety of our plans,</p> <p>13 record-keep other or outside managers' assets on</p> <p>14 our retirement programs.</p> <p>15 Q Are you aware of any specific</p> <p>16 investment product for which TIAA cannot provide</p> <p>17 record keeping services?</p> <p>18 A I am -- I do not know.</p> <p>19 Q Okay.</p> <p>20 Can TIAA provide record keeping</p> <p>21 services for investment options offered by</p> <p>22 Fidelity?</p> <p>23 A As of right now, I understand</p> <p>24 the answer is -- that there has -- that is not</p>

<p style="text-align: right;">Page 102</p> <p>1 in place right now in terms of an agreement. 2 Q Okay. Is there any technical 3 limitation on TIAA's ability to record-keep 4 Fidelity investment products? 5 A I can't speak with specificity 6 to every Fidelity product, so I don't know with 7 specificity. 8 Q Are you aware of any specific 9 reason why it would be impossible for TIAA to 10 record-keep any Fidelity product? 11 MR. KONSTANDT: Objection to 12 the form. 13 A Could you repeat the question 14 again, please? 15 Q Were you able to hear me? 16 A I heard you. 17 Q Okay. 18 So the question was are you 19 aware of any specific reason why it would be 20 impossible for TIAA to record-keep any 21 particular Fidelity product. 22 MR. KONSTANDT: Same objection. 23 A Yeah, as I said, I'm not aware 24 of the intricacies of every product that</p>	<p style="text-align: right;">Page 104</p> <p>1 particular Fidelity product? 2 A I simply don't know. Fidelity 3 has a breadth of product, and I can't speak to, 4 with specificity, the ability to. 5 Q Okay. 6 You mentioned there is a lack 7 of an agreement between Fidelity and TIAA with 8 respect to TIAA record keeping Fidelity product. 9 Is that what you said? 10 A That -- that's what I said. As 11 of right now, I do not believe that an agreement 12 is in place for either to record-keep the 13 other's products. 14 Q Has TIAA ever explored the 15 possibility of record keeping Fidelity 16 investments with Fidelity? 17 A As I understand it, there have 18 been conversations in that regard. 19 Q Do you know why Fidelity has 20 not agreed to allowed TIAA to record-keep its 21 products? 22 A I do not. 23 Q Does TIAA allow Fidelity to 24 record-keep TIAA products?</p>
<p style="text-align: right;">Page 103</p> <p>1 Fidelity record -- offers, nor with specificity 2 about the ability for us to record-keep those 3 products. 4 Q So as you sit here today as 5 TIAA's representative, you're not aware of any 6 specific obstacle that would prevent TIAA from 7 providing record keeping services for Fidelity 8 investment products; is that right? 9 MR. KONSTANDT: I'm just going 10 to inject an objection. 11 I think one of the problems 12 here, Mr. Braitberg, is the terminology 13 you're using. Are you talking about 14 the technical ability or the agreement 15 he referenced earlier? I'm not sure I 16 understand what you're getting at when 17 you say it's impossible, or the reasons 18 for why it's impossible. 19 MR. BRAITBERG: Sure, that's 20 fair. I can clarify. 21 Q So from a technical 22 perspective, putting aside any business disputes 23 or disagreements, are you aware of any specific 24 reasons of why TIAA could not record-keep any</p>	<p style="text-align: right;">Page 105</p> <p>1 A As of right now, as I 2 understand it, neither of the two parties 3 provide for the other to distribute products. 4 Q Okay. And do you have any 5 information as to the reasons why that is? 6 A With specificity, I do not. 7 Q How about generally? 8 A As I understand it, the 9 business arrangement has not been agreed to 10 across the two parties -- between the two 11 parties. 12 Q Okay. So it's fair to say it's 13 in the nature of a business dispute, as opposed 14 to any technical limitation? Is that true? 15 MR. KONSTANDT: Objection, 16 misstates testimony. 17 A That is not what I said. I 18 simply said that -- that the agreement has not 19 been made yet. And when I did make reference to 20 a business decision, it certainly could extend 21 to any variety of specific elements that could 22 pertain to, with certainty, record keeping as 23 well. 24 With specif --</p>

<p style="text-align: right;">Page 122</p> <p>1 about the accumulation units. 2 Is that something that is 3 tracked by the investment management arm? 4 A I believe the accumulation 5 units are tracked by the record keeping side of 6 the house, as opposed to the investment 7 management side. But I -- but -- with a big 8 but -- I can't say with specificity perfectly, 9 but that's where I believe that record keeping 10 to take place. 11 Q Okay. 12 What are the differences 13 required for record keeping fixed annuity versus 14 a mutual fund? 15 A Well, I can express there's -- 16 wait, could you -- you just said "fixed 17 annuity"; correct? 18 Q Yes. 19 A Well, I -- with respect to 20 record keeping a fixed annuity, that's a general 21 statement, and I can't speak to it because it's 22 very product-specific. There are many different 23 companies that offer fixed annuities, and I 24 really have no basis to speak to many that are</p>	<p style="text-align: right;">Page 124</p> <p>1 participants benefit from. There's guaranteed 2 minimums that the crediting rate through time 3 will not go below. And that said, that's not to 4 say that that minimum crediting rate is the rate 5 that participants get; they get a rate that is 6 more of a current reflection of what the general 7 account is able to offer, often which -- and for 8 the majority of the time -- is above that 9 minimum crediting rate, but the minimum 10 crediting rate can come into play at times, too. 11 So when we talk about the 12 product, there's complexity associated with 13 crediting rates, how we -- how we apply those, 14 and there is also -- with respect to how we 15 vintage record-keep the product, there's 16 separately a thing called dividend roll-forward 17 that's incredibly complex. 18 Separately, TIAA is mission 19 driven, and it's the general account of TIAA 20 that supports the product and its returns that 21 are delivered to participants, and in the 22 process of maintaining an asset -- a portfolio 23 that supports the product, we are required by 24 law to hold back contingency reserves to ensure</p>
<p style="text-align: right;">Page 123</p> <p>1 in the marketplace. So a very general question 2 that I don't have a strong knowledge to. 3 Q Well, let's just talk about -- 4 let's just talk about TIAA Traditional. 5 What are the differences 6 between what is required for record keeping TIAA 7 Traditional versus mutual funds? 8 A There's many differences in 9 character, and I can speak to some of them. I 10 can't -- I can't express that I'm speaking to 11 all of them, but I can at least bring some of 12 the highlighted differences here to the table. 13 The TIAA Traditional annuity is 14 a highly complex product that brings tremendous 15 value to our participants in both accumulation 16 and in distribution. It has a very unique 17 construct that is specific to TIAA in how the 18 product has, you know, been administered through 19 time. 20 When we talk about from a 21 character perspective, the TIAA Traditional 22 annuity is a guaranteed product. It means that 23 contractually, as we discussed before, there are 24 certain guarantees that are put forward that</p>	<p style="text-align: right;">Page 125</p> <p>1 that payouts can continue as contractually 2 specified and guaranteed, even in times when the 3 market be -- might be very rough, and perhaps 4 even losses might be taken, so there is required 5 contingency reserves. 6 How we handle the treatment of 7 the distribution of any potential excess 8 contingency reserves is also highly specific to 9 what we do, and certainly very different from a 10 variable annuity. And then, associated with the 11 product as well, is the transition from 12 accumulation to distribution. There are 13 myriad -- there are multiple distribution 14 options available from the TIAA Traditional 15 annuity that include lifetime income, many 16 variations within it, among other payout options 17 as well, and as well a different sort of vintage 18 record keeping system attached to those in 19 payouts. 20 So those are some of the 21 differentials between the TIAA Traditional 22 product and our variable annuities to put on the 23 record. 24 Q What do you understand the term</p>


<p style="text-align: right;">Page 186</p> <p>1 in order to assess the reasons for the change in 2 the benchmark? 3 MR. KONSTANDT: Same objection. 4 A I can't say with specificity, 5 given the general nature of the question. 6 Q Are you familiar with the CREF 7 Stock Account? 8 A I am. 9 Q And as we've discussed, that's 10 a variable annuity; yes? 11 A It is a variable annuity. 12 Q And what is its composition in 13 terms of the component investments? 14 A Sure. 15 The CREF Stock Account is a 16 multi-dimensional vehicle that has been 17 historically designed, and continues to be, a 18 vehicle that can offer the opportunity for 19 singular and very well-diversified exposure to 20 the breadth of equities globally. Its construct 21 generally is a 70 percent allocation -- 22 strategic allocation to domestic securities, a 23 30 percent allocation to foreign securities, 24 including both developed and emerging markets.</p>	<p style="text-align: right;">Page 188</p> <p>1 Q And it's true, isn't it, that 2 the -- for the different share classes there's 3 no difference in terms of the underlying 4 strategy or holdings; is that right? 5 A That is correct. 6 Q And the difference between the 7 different share classes is simply the amount of 8 expenses and the expense ratio; is that right? 9 MR. KONSTANDT: Objection to 10 form. 11 A The different share classes 12 provide differentials in terms of the -- 13 generally put -- the administrative or the 14 record keeping fee that is -- that is included 15 within each of those share classes. 16 Q So are there any other 17 differences besides the expenses between the 18 different share classes with the CREF Stock 19 Account? 20 A As far as I know, that is the 21 differential. 22 Q When were those different share 23 classes of the CREF Stock Account first made 24 available?</p>
<p style="text-align: right;">Page 187</p> <p>1 It is diversified by asset class -- I'm sorry. 2 It is diversified by capitalization, having 3 large cap, mid cap and small cap companies, as 4 well by style, representing both growth and 5 value styles. And then, going further, its 6 construct is quite elegant in that it includes 7 multiple types of investment management that 8 include both fundamentally active management as 9 well as quantitatively active management, with 10 the design to provide strong opportunity for 11 growth, capital appreciation, while at the same 12 time, by combining all of these factors 13 together, including the fundamental and the 14 quantitative, muting the overall risk profile of 15 the fund -- of the vehicle, I'm sorry, I should 16 say -- such so that the experience is, you know, 17 providing strong upside with -- with risk 18 mitigation on the down. 19 Q Does the CREF Stock Account 20 have different share classes? 21 A The CREF Stock Account is 22 expressed for plan sponsor clients with the 23 potential for three different share classes 24 today.</p>	<p style="text-align: right;">Page 189</p> <p>1 A I believe the year was 2015. 2 Q Did Cornell request that TIAA 3 adopt different share classes for the CREF Stock 4 Account? 5 MR. KONSTANDT: Objection to 6 the form, outside the scope of this 7 witness' enumerated topics. 8 A I do not know. 9 Q Did -- when TIAA made different 10 share classes available to the CREF Stock 11 Account, did it do so only with respect to 12 certain clients, or did it do so for everyone 13 who invested in CREF Stock Account? 14 A I don't know the answer. 15 Q Why did TIAA adopt share 16 classes for CREF Stock Account? 17 A The different share classes was 18 in response to the market, desiring to have a 19 differential in the fee structures, such so that 20 different types of our plan sponsor clients 21 might be run at different -- generally speaking, 22 with different scale, and, accordingly, the 23 associated, on a percentage basis, fee that 24 would be associated with serving the record</p>

<p style="text-align: right;">Page 194</p> <p>1 A As I have said consistently, I 2 cannot speak to, I do not know, and I am not 3 privy to, any request that Cornell did or did 4 not make pertaining to the development or 5 utilization of the multi-share class structure 6 deployed within CREF. 7 Q Okay. I would move to strike 8 your answer as non-responsive because I'm not 9 asking you about whether you're privy to 10 information about Cornell, I'm asking you to 11 elaborate on your previous answer in which you 12 told me why TIAA adopted the share class, okay. 13 You said there are some 14 reasons -- you gave me some reasons for that. 15 So my question is, do those reasons -- yes or 16 no -- include anything that Cornell did. 17 MR. KONSTANDT: I'm just going 18 to insert an objection here, 19 Mr. Braitberg. 20 His original answer was about 21 response to the market, and all he is 22 saying is he doesn't know whether or 23 not that had anything to do with 24 Cornell because he has nothing to do</p>	<p style="text-align: right;">Page 196</p> <p>1 focused aspect offered by MSCI that includes 2 both developed and emerging markets. The two 3 combine together in the CREF composite generally 4 in a 70 and 30 -- 70 percent Russell 3000, 5 30 percent MSCI ACWI ex-US IMI. 6 Q Now, you said generally the 7 distribution is 70/30. Has that ever changed? 8 A It has evolved through time. 9 Strategically, right now that's where it stands. 10 The product hasn't always had exactly that same 11 70/30 split. 12 Q I'm asking you specifically 13 about the composite index now that's used as the 14 benchmark -- I'm sorry, the CREF composite 15 benchmark. Has the components of that benchmark 16 changed in terms of the percentage distribution 17 between the Russell and the MSCI ACWI index? 18 A Those representatives have 19 changed through time, particular with the 20 orientation of the product. 21 Q Okay. So the relative weight 22 of those two indexes varies over time in a way 23 that matches the holdings of the CREF Stock 24 Account; is that right?</p>
<p style="text-align: right;">Page 195</p> <p>1 with Cornell. I think we're arguing 2 over nothing right now, but you're 3 welcome to keep asking the questions. 4 A I do not know anything 5 pertaining to Cornell's push, desire, motivation 6 towards TIAA-CREF to adopt a share classing 7 structure with CREF. 8 Q What is the current stated 9 benchmark for the CREF Stock Account? 10 A The current stated benchmark 11 for CREF Stock is known as the CREF composite. 12 Q And what does the CREF 13 composite consist of? 14 A The CREF composite consists of 15 two primary components, and it relates to my 16 description of the vehicle previously, in that 17 one component is known as the Russell 3000, 18 which is a broad representation of the domestic 19 market that includes large cap, mid cap and 20 small cap companies, as well as a representation 21 that includes both growth and value stocks, and 22 separately a component that is represented by 23 the MSCI ACWI -- A-C-W-I -- IMI index -- the 24 ACWI IMI index -- which is a -- an international</p>	<p style="text-align: right;">Page 197</p> <p>1 A That's generally a correct 2 assessment, yes, in that through time, as the 3 strategic allocation has adapted, the CREF 4 composite adapts along with it to provide a fair 5 representation. 6 Q Does TIAA publish the current 7 distribution breakdown between the two 8 components of the CREF composite benchmark? 9 A I believe we do, but I would 10 need to reference -- specifically, I believe the 11 depiction is broken down in various 12 documentation that we have. 13 Q And where -- and what 14 documentation is that? 15 A I would need to make reference 16 to be sure, but I believe it is made reference 17 to in the prospectus. But I would need to 18 double check that. 19 Q Okay. The 70/30 Russell/MSCI 20 ACWI CREF composite, how long has that been the 21 stated benchmark for the CREF Stock Account? 22 A That goes back a number of 23 years now. I believe going back to, perhaps, in 24 the 2013 time period perhaps.</p>

<p style="text-align: right;">Page 198</p> <p>1 Q What was used as the stated 2 benchmark prior to that time period? 3 A Yeah, there were a multiple of 4 different constituents on which I would have to 5 reflect because it's been some time. 6 To simplify, the constituents 7 through time have matched the strategic 8 allocation, albeit if they were even -- they 9 could have been reflected via different 10 subcomponents of the CREF composite. 11 So said differently, the CREF 12 composite has consistently reflected the 13 composition of the vehicle, albeit through time 14 sometimes that has been by way of slightly 15 different components underneath, but still 16 achieving the same general means to the 17 comparison. 18 Q Why is the CREF composite used 19 as the stated benchmark as opposed to, say, the 20 S&P 500? 21 A The CREF composite is an 22 incredibly accurate reflection of the strategic 23 allocation of the fund. I'm sure -- I'm sorry, 24 the account.</p>	<p style="text-align: right;">Page 200</p> <p>1 Q And why is that important in a 2 benchmark? 3 A To the extent that your 4 benchmark is consistent with the management of 5 the vehicle, it provides a good reasonable basis 6 for comparing through time. 7 Q Why is the CREF composite used 8 as opposed to, say, the Russell 3000 as the 9 benchmark for the CREF Stock Account? 10 A The CREF composite -- while the 11 Russell 3000 is a component of the CREF 12 composite, the CREF composite also includes the 13 international flavor with the ACWI ex-US 14 component, and that reflects the more global 15 nature or the international investment aspect of 16 the CREF Stock Account, while the Russell 3000 17 is purely domestic. 18 Q So the Russell 3000 would not 19 provide the same degree of reasonable basis of 20 comparing performance through time as the CREF 21 composite benchmark would; is that right? 22 MR. KONSTANDT: Objection to 23 form. 24 A We believe the CREF composite</p>
<p style="text-align: right;">Page 199</p> <p>1 The S&P 500, should it be the 2 stated benchmark, wouldn't be as -- as specific 3 as the CREF composite. 4 Q So using the S&P 500 as a 5 benchmark wouldn't give the same type of 6 relative performance information -- 7 MR. BRAITBERG: Let me restate 8 the question. 9 Q If the S&P 500 were used as the 10 benchmark, the quality of the comparative 11 information would not be as good as if using the 12 CREF composite as the benchmark; is that right? 13 A What -- what we hold as the 14 primary benchmark for the CREF Stock Account is 15 the CREF composite, and the way that we offer 16 the construct of the CREF composite is 17 consistent with how the product is managed. The 18 S&P 500 would not match that with the same 19 specificity as the CREF composite. 20 Q And why would that be a reason 21 not to use it as the benchmark? 22 A We believe the CREF composite 23 represents the most accurate depiction of the 24 underlying components of the CREF Stock Account.</p>	<p style="text-align: right;">Page 201</p> <p>1 is the referenced benchmark that most accurately 2 reflects the composition of the CREF Stock 3 Account. 4 Q You said that one reason that 5 it's important to have the CREF composite as the 6 benchmark is because it provides a reasonable 7 basis for comparing through time. 8 Would the Russell 3000 provide 9 a similar reasonable basis for comparing through 10 time? 11 A It provides a basis for 12 comparison, but not the same basis for 13 comparison, as it lacks the international 14 exposure. 15 Q Okay. And why is that 16 important? 17 A Both international equities and 18 domestic equities don't necessarily perform the 19 same, nor is their composition the same, and 20 therefore there are going to be periods of time, 21 typically when you can have performance 22 differentials and characteristic differentials 23 between the two, and so by not including that 24 global component one would be missing that.</p>

<p style="text-align: right;">Page 202</p> <p>1 Q Okay.</p> <p>2 Other than the CREF composite</p> <p>3 in its various incarnations, has TIAA ever used</p> <p>4 any other stated benchmark for the CREF Stock</p> <p>5 Account?</p> <p>6 A As far as I know, the CREF</p> <p>7 composite has been the representation that we</p> <p>8 have leaned upon as the primary stated</p> <p>9 benchmark.</p> <p>10 Q Okay. I'd like to draw your</p> <p>11 attention to document CAPTR underscore 0035943.</p> <p>12 MR. BRAITBERG: And this is</p> <p>13 going to be marked as Exhibit 194 in</p> <p>14 comprehensive exhibit list.</p> <p>15 (Document beginning Bates No.</p> <p>16 CAPTR_0035943 marked Exhibit 194 for</p> <p>17 identification.)</p> <p>18 Q And let me know when you have</p> <p>19 that document out.</p> <p>20 (Pause)</p> <p>21 A Okay, I have it.</p> <p>22 Q Okay. And are you familiar</p> <p>23 with this type of document?</p> <p>24 A Let me just search through it.</p>	<p style="text-align: right;">Page 204</p> <p>1 right?</p> <p>2 MR. KONSTANDT: Objection to</p> <p>3 the form.</p> <p>4 A So as I understand this form,</p> <p>5 mandated, I believe, by the DOL, to be</p> <p>6 distributed by plan sponsors outwardly to</p> <p>7 participants -- I'm sorry, record keepers,</p> <p>8 outwardly to plan participants -- that this is a</p> <p>9 required form, and that's why it is being</p> <p>10 provided.</p> <p>11 Q Do you know if it's required to</p> <p>12 include a benchmark in this type of document?</p> <p>13 MR. KONSTANDT: Objection to</p> <p>14 the form.</p> <p>15 A I -- I believe that it is</p> <p>16 required to -- that a -- a benchmark that meets</p> <p>17 certain criteria specified by the DOL be</p> <p>18 provided within the form.</p> <p>19 Q Okay.</p> <p>20 And so, in fact, what we see</p> <p>21 here on page 10 is a number of different</p> <p>22 investment options and some other information,</p> <p>23 including a benchmark; is that right?</p> <p>24 A I see, as you say, references</p>
<p style="text-align: right;">Page 203</p> <p>1 (Pause)</p> <p>2 Q Have you seen this document</p> <p>3 before?</p> <p>4 A I'm just reviewing it to ensure</p> <p>5 that I do understand its nature.</p> <p>6 Q Okay. Let me know when you're</p> <p>7 ready.</p> <p>8 A Okay.</p> <p>9 (Pause)</p> <p>10 A I do believe that I am</p> <p>11 generally familiar with this type of a document,</p> <p>12 which I believe is one that is mandated by the</p> <p>13 DOL for record keepers to provide.</p> <p>14 Q Okay. So this is a required</p> <p>15 disclosure to plan participants; right?</p> <p>16 A I believe that to be the case.</p> <p>17 Q I'd like to draw your attention</p> <p>18 to page 10 of this document. And let me know</p> <p>19 when you're there.</p> <p>20 (Pause)</p> <p>21 A Yes, I have it.</p> <p>22 Q So your understanding is that,</p> <p>23 generally speaking, it's required to include a</p> <p>24 benchmark in this type of document; is that</p>	<p style="text-align: right;">Page 205</p> <p>1 to particular investment vehicles and then what</p> <p>2 appears to be, adjacent to them, representations</p> <p>3 of some comparative figure.</p> <p>4 Q Okay. And that comparative</p> <p>5 figure, is that the benchmark that is required</p> <p>6 that you mentioned earlier?</p> <p>7 A That is my understanding, is</p> <p>8 that would be the comparison that would be</p> <p>9 mandated by the DOL be supplied for each</p> <p>10 vehicle.</p> <p>11 Q Okay. Do you see on here where</p> <p>12 it says, "CREF Stock Account R3"?</p> <p>13 A I do.</p> <p>14 Q And then next to it it says</p> <p>15 "Russell 3000 Index"?</p> <p>16 A Right below it I see that.</p> <p>17 Q Yes.</p> <p>18 And so the Russell 3000 Index</p> <p>19 is being set forth in this document as the</p> <p>20 benchmark for the CREF Stock Account; is that</p> <p>21 right?</p> <p>22 A That's what I see on this form.</p> <p>23 Q Okay.</p> <p>24 And why is -- do you know why</p>

<p style="text-align: right;">Page 206</p> <p>1 the CREF composite benchmark is not included 2 here on this form? 3 A With specificity, the way that 4 I understand this form, as mandated by the DOL, 5 is that there are several parameters, or 6 requirements, that it puts forward for the 7 specific defined benchmark for any particular 8 option that must be met, and in particular, 9 while we hold the CREF composite to certainly be 10 the primary benchmark, prospectus-driven, that 11 we hold out for plan participants, in this case 12 the Russell 3000 is offered. 13 As I understand it, the reason 14 why we cannot select the CREF composite as that 15 which we would offer here pertains to the fact 16 that it is what would be deemed, I believe, to 17 be an affiliated reference -- benchmark, as it 18 were -- in that affiliated meaning, you know, of 19 the entity that offers the product, and so in 20 this case the CREF composite is specific to 21 TIAA -- or I should say CREF -- in terms of its 22 representation for the product, and therefore 23 would be disallowed by the DOL for its 24 inclusion.</p>	<p style="text-align: right;">Page 208</p> <p>1 misleading about including the CREF composite on 2 this document as well as the Russell 3000, would 3 there? 4 MR. KONSTANDT: Objection to 5 the form. 6 A I -- I can't at all speak to -- 7 the way that I understand this form is that we 8 are precluded from making references to the CREF 9 Stock Account as -- I'm sorry. 10 We are precluded from making 11 representations of the CREF composite as 12 benchmarking the CREF Stock Account on this 13 form, effectively that the Department of Labor 14 has particular requirements, and we are 15 precluded from offering what we have as the 16 primary benchmark for the product here. 17 Q Okay. This form aside, just in 18 general, certainly it's not TIAA's position that 19 using the CREF composite benchmark as a basis 20 for comparison with the CREF Stock Account is in 21 any way misleading, is it? 22 A Can you repeat the question, 23 please? 24 Q Sure.</p>
<p style="text-align: right;">Page 207</p> <p>1 Q Is it TIAA's position that 2 including information about the CREF composite 3 benchmark on this document would be in any way 4 misleading? 5 MR. KONSTANDT: Objection to 6 the form. 7 A Can you repeat the question, 8 please? 9 Q Sure. 10 Is it TIAA's position that 11 inclusion of information about the CREF 12 composite benchmark in this document would be 13 misleading? 14 MR. KONSTANDT: Same objection. 15 A I can't speak to that. What I 16 can speak to is as the company has evaluated how 17 to represent a benchmark given the particulars 18 of the requirements that the DOL has, that the 19 CREF composite would be disallowed from 20 consideration, and therefore an alternative 21 representation would have to be made in order to 22 meet the requirements specified by the DOL. 23 Q Okay, but the requirements 24 aside, certainly there would be nothing</p>	<p style="text-align: right;">Page 209</p> <p>1 It's certainly not TIAA's 2 position that using the CREF composite benchmark 3 as a basis for comparison with the CREF Stock 4 Account is in any way misleading, is it? 5 A We believe the CREF composite 6 to be an -- a good and reasonable benchmark for 7 the product, and that's what we do articulate, 8 as it is the primary defined within our 9 prospectus. 10 Q And, similarly, there's nothing 11 inaccurate about comparing the CREF composite 12 benchmark to the CREF Stock Account, is there? 13 A We believe the CREF composite 14 to be a -- a good reference point for investors 15 making one basis of comparison among many, but 16 one basis of comparison with respect to a 17 referenced index. Or benchmark, I should say. 18 Q Do you think it's inaccurate or 19 misleading in any way to set forth the Russell 20 3000 Index as a basis for comparison with the 21 CREF Stock Account? 22 A While we hold the CREF Stock 23 Account to have the CREF composite be its 24 primary and prospectus-driven benchmark, you</p>

<p style="text-align: right;">Page 274</p> <p>1 C E R T I F I C A T E</p> <p>2</p> <p>3 I, HELEN MITCHELL, a Registered</p> <p>4 Professional Reporter and Notary Public, do</p> <p>5 hereby certify:</p> <p>6 I reported the proceedings in the</p> <p>7 within-entitled matter, and that the within</p> <p>8 transcript is a true record of such proceedings.</p> <p>9 I further certify that I am not related, by</p> <p>10 blood or marriage, to any of the parties in this</p> <p>11 matter and that I am in no way interested in the</p> <p>12 outcome of this matter.</p> <p>13 IN WITNESS WHEREOF, I have hereunto set my</p> <p>14 hand this 14th day of August, 2018.</p> <p>15</p> <p>16 </p> <p>17 HELEN MITCHELL, RPR</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>	<p style="text-align: right;">Page 276</p> <p>1 E X H I B I T S</p> <p>2 (Continued)</p> <p>3 FOR IDENTIFICATION PAGE</p> <p>4 Exhibit 195 Document entitled "Plan 212</p> <p>5 and Investment Notice,</p> <p>6 Cornell University Tax</p> <p>7 Deferred Annuity Plan"</p> <p>8 beginning Bates No.</p> <p>9 CAPTR_0012262</p> <p>10 Exhibit 196 2009 prospectus 215</p> <p>11 beginning Bates No.</p> <p>12 TIAA_CORNELL_00020947</p> <p>13 Exhibit 197 May 1, 2013 prospectus 222</p> <p>14 and supplement beginning</p> <p>15 Bates No.</p> <p>16 TIAA_CORNELL_00023057</p> <p>17 Exhibit 198 Supplement to May 1, 224</p> <p>18 2017 CREF prospectus</p> <p>19 beginning Bates No.</p> <p>20 TIAA_CORNELL_00043690</p> <p>21 Exhibit 199 May 1, 2017 prospectus 247</p> <p>22 for TIAA Real Estate</p> <p>23 Account beginning Bates</p> <p>24 No.</p> <p> TIAA_CORNELL_00043802</p> <p> Exhibit 200 Document beginning Bates 254</p> <p> No. MSTAR 000099</p> <p> Exhibit 201 Document beginning Bates 255</p> <p> No. MSTAR 001551</p> <p> Exhibit 202 Participant disclosure 257</p> <p> document beginning</p> <p> bearing Bates No.</p> <p> CAPTR_0004600</p> <p> Exhibit 203 Document labeled 261</p> <p> "2007-12-31 CREF Stock</p> <p> Account R3 Fact</p> <p> Sheet.PDF"</p>
<p style="text-align: right;">Page 275</p> <p>1 August 10, 2018</p> <p>2 I N D E X</p> <p>3 WITNESS EXAMINATION BY PAGE</p> <p>4 ADAM POLACEK Mr. Braitberg 8</p> <p>5 Mr. Konstandt 268</p> <p>6 Mr. Myler 269</p> <p>7</p> <p>8 E X H I B I T S</p> <p>9</p> <p>10 FOR IDENTIFICATION PAGE</p> <p>11 Exhibit 188 Document beginning Bates 31</p> <p>12 No. CAPTR_0049463</p> <p>13 Exhibit 189 E-mail string beginning 43</p> <p>14 Bates No. CAPTR_0049509</p> <p>15 Exhibit 190 August 4, 2017 e-mail 68</p> <p>16 from Anne Riley bearing</p> <p>17 Bates No.</p> <p>18 TIAA_CORNELL_00039617</p> <p>19 Exhibit 191 E-mail string beginning 71</p> <p>20 Bates No. CORNELL 013358</p> <p>21 Exhibit 192 December 23, 2016 e-mail 88</p> <p>22 from Matthew Leggett</p> <p>23 bearing Bates No.</p> <p>24 CAPTR_0035562</p> <p> Exhibit 193 E-mail string beginning 168</p> <p> Bates No. CORNELL 002493</p> <p> Exhibit 194 Document beginning Bates 202</p> <p> No. CAPTR_0035943</p>	<p style="text-align: right;">Page 277</p> <p>1 E X H I B I T S</p> <p>2 FOR IDENTIFICATION PAGE</p> <p>3 Exhibit 204 CREF Stock Account fact 266</p> <p>4 sheet beginning Bates</p> <p>5 No.</p> <p>6 TIAA_CORNELL_00028551</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>

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1 Veritext Legal Solutions
1100 Superior Ave
2 Suite 1820
Cleveland, Ohio 44114
3 Phone: 216-523-1313
4
5 August 14, 2018
6 To: Mr. Konstandt
7 Case Name: Cunningham, Casey v. Cornell University, Et Al
8 Veritext Reference Number: 2987554
9 Witness: Adam Polacek Deposition Date: 8/10/2018
10 Dear Sir/Madam:
11 Enclosed please find a deposition transcript. Please have the witness
12 review the transcript and note any changes or corrections on the
13 included errata sheet, indicating the page, line number, change, and
14 the reason for the change. Have the witness' signature notarized and
15 forward the completed page(s) back to us at the Production address
16 shown
17 above, or email to production-midwest@veritext.com.
18 If the errata is not returned within thirty days of your receipt of
19 this letter, the reading and signing will be deemed waived.
20
21 Sincerely,
22 Production Department
23
24 NO NOTARY REQUIRED IN CA

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1 DEPOSITION REVIEW
2 CERTIFICATION OF WITNESS
3 ASSIGNMENT REFERENCE NO: 2987554
4 CASE NAME: Cunningham, Casey v. Cornell University, Et Al
5 DATE OF DEPOSITION: 8/10/2018
6 WITNESS' NAME: Adam Polacek
7 In accordance with the Rules of Civil
8 Procedure, I have read the entire transcript of
9 my testimony or it has been read to me.
10 I have made no changes to the testimony
11 as transcribed by the court reporter.
12
13 _____
14 Date Adam Polacek
15 Sworn to and subscribed before me, a
16 Notary Public in and for the State and County,
17 the referenced witness did personally appear
18 and acknowledge that:
19 They have read the transcript;
20 They signed the foregoing Sworn
21 Statement; and
22 Their execution of this Statement is of
23 their free act and deed.
24 I have affixed my name and official seal
25 this _____ day of _____, 20____.

Notary Public

Commission Expiration Date

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1 DEPOSITION REVIEW
2 CERTIFICATION OF WITNESS
3 ASSIGNMENT REFERENCE NO: 2987554
4 CASE NAME: Cunningham, Casey v. Cornell University, Et Al
5 DATE OF DEPOSITION: 8/10/2018
6 WITNESS' NAME: Adam Polacek
7 In accordance with the Rules of Civil
8 Procedure, I have read the entire transcript of
9 my testimony or it has been read to me.
10 I have listed my changes on the attached
11 Errata Sheet, listing page and line numbers as
12 well as the reason(s) for the change(s).
13 I request that these changes be entered
14 as part of the record of my testimony.
15
16 I have executed the Errata Sheet, as well
17 as this Certificate, and request and authorize
18 that both be appended to the transcript of my
19 testimony and be incorporated therein.
20
21 _____
22 Date Adam Polacek
23 Sworn to and subscribed before me, a
24 Notary Public in and for the State and County,
25 the referenced witness did personally appear
and acknowledge that:
They have read the transcript;
They have listed all of their corrections
in the appended Errata Sheet;
They signed the foregoing Sworn
Statement; and
Their execution of this Statement is of
their free act and deed.
I have affixed my name and official seal
this _____ day of _____, 20____.

Notary Public

Commission Expiration Date

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1 ERRATA SHEET
2 VERITEXT LEGAL SOLUTIONS MIDWEST
3 ASSIGNMENT NO: 8/10/2018
4 PAGE/LINE(S) / CHANGE /REASON
5 _____
6 _____
7 _____
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12 _____
13 _____
14 _____
15 _____
16 _____
17 _____
18 _____
19 _____
20 _____
21 Date Adam Polacek
22 SUBSCRIBED AND SWORN TO BEFORE ME THIS _____
23 DAY OF _____, 20____.
24 _____
25 Notary Public

Commission Expiration Date